Inpt71-06

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

Insolvency petition no. 71 OF 2006

NEETA H. PANCHMATIA ... Petitioning creditor
V/S
ANANT V. HEGDE AND ANR. ... Judgment Debtors

H. V. CHANDE for petitioning creditor .
Mr. Pankaj Kansaria Judgment Debtors

CORAM: **D.G. KARNIK J**.

DATE: February, 20, 2007

P.C.:

1. Heard learned counsel for the petitioning creditor and the judgment debtors. In summary suit no.1217 of 2002 a money decree was passed against the judgment debtor by this court. As the judgment debtors failed to pay the amount due under the money decree the petitioning creditor served an insolvency notice No.202 of 2005 on the judgment debtors. Notice of Motion No. 29 of 2006 taken out by the judgment debtors for setting aside the insolvency notice was dismissed by this court on 2nd May 2006. Petitioning creditor has thereafter filed the present petition for adjudging the judgment debtors as insolvent.

2. By filing affidavit in reply the judgment debtors have opposed the petition. Learned counsel for the judgment debtors submitted that though the judgment debtors wish to pay the decreetal amount they are unable to pay the same because of the order dated 24th September 2002 passed by the BIFR in Reference No. 49 of 2000 against M/s. Electronics India Ltd., (hereinafter referred to as the Company) of which the judgment debtors are directors. He therefore submited that the judgment debtors should not be declared as insolvents.

3. By the order dated 24th September 2002 passed by the BIFR in Reference No. 49 of 2000 the company was granted protection under the Sick Industrial Companies Act and an operating agency was appointed for taking steps for revival of the company. Since the company was granted protection under the Sick Industrial Companies Act (for short SICA) the company was directed not to dispose of or alienate any of its fixed assets without prior approval of the BIFR. The guarantors and directors of the company were also directed not to alienate, dispose of or encumber their assets since the company was granted protection under section 22 (1) of the SICA.
4. When the Insolvency Notice No. 202 of 2005 was served on the judgment debtors, the judgment debtors took out Notice of Motion No. 29 of 2006 raising several contentions for

setting aside the insolvency notice. One of the contentions raised was that the decree was passed against the judgment debtors individually without filing decree against the firm as a party and therefore the decree was not executable. The defence was rejected by this court. Another defence was that one of the partners had paid the money and therefore the decree was not executable. The court considered the defence and held that the decree was passed after giving credit of the money paid by the other partner and therefore the decree was fully executable. The judgment debtors never took a ground in Notice of Motion No. 29 of 2006 that they were not able to pay the money on account of any stay granted by the BIFR. The judgment debtors could have and ought to have taken up this defence and not taking up a defence would amount to res judicate under section 11 of the Civil Procedure Code. It would not be possible for the judgment debtors to contend that they are solvent enough to pay the money but are not able to do so only on account of the order passed by the BIFR. In any event there is no restriction on the judgment debtors not to pay the amount. They have been restrained from disposing of the assets and not from paying decreetal dues under an executable decree that has been passed against them. The order of BIFR permits even the company to dispose of or alienate its assets after obtaining permission from the BIFR. The judgment debtors have not

taken any steps for obtaining the permission for disposing of any of the assets for the purpose of paying the decreetal dues. In the circumstances there is no merit in the defence. The petition is therefore made absolute in terms of prayer clause (a).

5. A joint advertisement be issued in respect of this and other insolvency / petitions filed against the judgment debtors.

(D.G. KARNIK J.)